Qwest
607 14th Street, NW, Suite 950
Washington, DC 20005
Phone 202-429-3120
Facsimile 202-293-0561

Melissa E. Newman
Vice President – Federal Regulatory

EX PARTE

Electronic Filing via ECFS

February 3, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

RE: Virtual NXX – Legal Analysis
Intercarrier Compensation for ISP-Bound Traffic – CC Docket No. 99-68; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* – CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime* – CC Docket No. 01-92

Dear Ms. Dortch:

The attached legal analysis addresses intercarrier compensation for Virtual NXX traffic. On behalf of Qwest, I request that this *ex parte* and its attached legal analysis be placed in the public record of the above-captioned proceedings.

In accordance with Commission rule 47 C.F.R. § 1.49(f), this *ex parte* letter is being filed electronically *via* the Commission's Electronic Comment Filing System pursuant to Commission rule 47 C.F.R. § 1.1206(b)(1).

Respectfully,

/s/ Melissa E. Newman

Attachment

Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303-383-6650
Facsimile 303-896-1107

Robert B. McKenna
Associate General Counsel

February 3, 2005

M E M O R A N D U M

Virtual NXX – Legal Analysis

RE: *Intercarrier Compensation for ISP-Bound Traffic* – CC Docket No. 99-68; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* – CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime* – CC Docket No. 01-92

The following is an outline of legal principles governing what is popularly called "Virtual NXX" or "VNXX." VNXX describes a situation where a competitive local exchange carrier ("CLEC") uses a number that is assigned to a particular incumbent local exchange carrier ("ILEC") local calling area to serve a CLEC customer in a distant local calling area. CLECs have been using VNXX to service remote Internet service provider ("ISP") points of presence ("POPs") in an attempt to avoid assessment of access charges for interexchange use of ILEC local exchange networks and to collect unwarranted "reciprocal compensation" payments. CLECs are claiming that calls to a particular number should be treated as local for purposes of determining whether access charges should be assessed, regardless of the actual physical locations of the called and calling parties.

The CLECs' position is a significant departure from existing law. From the first time interstate access charges were established, calls that crossed exchange boundaries were treated as interexchange, and treated appropriately under the access charge structure. The Federal Communications Commission ("Commission") established the enhanced service provider ("ESP") exemption at that time and provided, for the purposes of access charge assessment, that the ESP POP was entitled to be classified as an end user. If the call to an ESP POP was within the local calling area of a calling party, access charges did not apply, even if the ESP further transmitted the call (generally in a different protocol) to a distant computer. If the ESP POP was in a separate exchange, the call was interexchange and, under the ESP exemption, treated under the access rules as an interexchange call. Therefore, calls from other exchanges to ESPs or ISPs are not subject to reciprocal compensation payments any more than are calls to and from remote PBXs or telephone stations.

The term VNXX actually encompasses two different types of situations which, from a regulatory perspective, often have quite different implications. In the first situation, which we call "intraLATA VNXX," both the calling party and the called party are within the same LATA, albeit in different local calling areas. In the second situation, the called party is located in a distant LATA, often in a different state, than is the calling party. This second situation is

denominated "interLATA VNXX." We use these terms separately throughout this memorandum because the two different VNXX constructs have, in critical areas, differing regulatory consequences. When the term "VNXX" is used by itself, it includes both interLATA and intraLATA VNXX.

Qwest's point is that the existing regulatory structure requires that the Commission recognize that calls are either local or interexchange based on the endpoints of each call. Both interLATA and intraLATA calls are properly classified as interexchange calls. Considerations of the applicability of access charges and/or reciprocal compensation flow from that basic recognition -- disagreements about the access charge result that might normally flow from the proper differentiation between local and long distance calls cannot lead to solutions based on improper classifications of the calls themselves. In other words, the Commission cannot misclassify interexchange calls as local in order to reach what is perceived as a more desirable result in the access charge arena. The access charge issue can be properly addressed independently without reliance on artifices. Ultimately the rules, absent other circumstances, call for assessment of access rather than reciprocal compensation (although the VNXX issue again points to the vital importance of the Commission moving towards a rational access structure along the "bill and keep" lines proposed by Qwest). Furthermore, the intrastate nature of intraLATA VNXX calls requires that the Commission examine its own jurisdiction over large parts of the VNXX question in detail, in order to determine that no finding or ruling dealing with intrastate rates or state authority reserved under Section 252 of the Act be made without full and appropriate jurisdictional analysis.

Qwest requests that the Commission focus whatever action is appropriate on the proper differentiation between local and long distance calls in the VNXX context, and draw the appropriate conclusions from these findings. VNXX calls are not local calls.

I. Introduction.

VNXX as presented to the Commission, while often analyzed as a single issue, actually encompasses four very distinct and different legal matters. While the pertinent issues presented often overlap, it is vital that the Commission identify each of the four and not make the mistake of failing to recognize that the issues are also often quite different. Confusing these discrete issues would seriously distort any Commission analysis of any part of the VNXX matters currently before it. In addition, it is important to realize where the Commission's legitimate jurisdiction lies in this area. While Qwest agrees that the VNXX issue has many aspects that merit attention by this Commission, others involve interpretation and arbitration of interconnection agreements under Section 252 of the Act, and the Commission must be cautious not to intrude into areas of contract formation and arbitration reserved to state regulators under the Act without a full and thorough jurisdictional analysis.[1]

[1] In this regard, it is important not to allow form to supersede substance. For example, should the Commission establish "default" rules that were to take effect only if the parties did not negotiate a voluntary interconnection agreement dealing with the VNXX issue, these default rules would negate the states' ability to arbitrate interconnection disputes and would themselves be substantive rules that would need to be examined under a proper jurisdictional analysis.

- IntraLATA VNXX. The traditional VNXX scenario involves what CLECs often call "virtual FX" [foreign exchange] service. AT&T's position is limited to intraLATA VNXX service, and AT&T presents it as an alternative to intraLATA FX service. AT&T claims that intraLATA VNXX service should be treated (for access and reciprocal compensation purposes) as analogous to intraLATA FX service provided by an ILEC. IntraLATA VNXX still entails an interexchange call. However, because ILEC intraLATA FX services are generally viewed as private line transport services ILECs do not generally charge themselves for local exchange access in providing intraLATA FX services. AT&T argues that intraLATA VNXX services should be treated as local calls on account of that treatment. Qwest agrees with AT&T that the access charge treatment of intraLATA FX and VNXX services should ultimately be the same, and supports efforts to achieve parity in state regulatory proceedings, but this has nothing to do with the proper classification of the call. Indeed, both the *Starpower* and *Verizon* decisions, which form the heart of much of the CLEC position on VNXX, relied largely on the notion of equality between intraLATA VNXX access and intraLATA FX access.[2] However, this equality is a matter of intrastate concern, and must be focused on how the state regulator chooses to evaluate such equality. It has nothing to do with whether an interexchange call can become local. A long distance call does not become a local call simply because it is more convenient to regulate the call as local. Instead, it is incumbent on the Commission to recognize the fact that any VNXX call (intraLATA or interLATA) is a long distance (interexchange) call. Whether other considerations might, in some circumstances, merit special access treatment is a separate matter, one which would seem initially to lie within the power of the states.[3]

---

[2] Over-reliance on *Starpower* and *Verizon* can prove highly misleading. *See Starpower Communications, LLC v. Verizon South Inc*., *Memorandum Opinion and Order*, 18 FCC Rcd 23625 (2003) ("*Starpower*"); *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, *Memorandum Opinion and Order*, 17 FCC Rcd 27039 (2002) ("*Verizon*"). These cases both involved Commission actions in situations where the state had relinquished jurisdiction under Section 252(e)(5) of the Act, and the jurisdiction of the Commission was subject to the special authority found in that section. *Starpower* involved interpretation of a Verizon tariff which defined the calls in question as "local" based on the dialed NXX, and *Verizon* involved an arbitration decision in which the Commission found that Verizon had given the CLEC "no viable alternative to the current system" of VNXX compensation. While both cases contain language that is helpful for an analysis, neither provides a precedential basis for the decision of any VNXX issues in the context of cases not before the Commission under Section 252(e)(5).

[3] If necessary, the Commission can address the problem of potential discrimination, if it exists, through the proper exercise of its jurisdiction. We are simply observing that the solution to the issue cannot depend on misclassification of a long distance call.

- IntraLATA ISP Traffic. A number of CLECs claim that, even if access charges were to be assessed on intraLATA VNXX traffic between local calling areas, such charges would be inappropriate in the case of calls when an ISP is involved. This is based on a misreading of the ESP exemption, under which these CLECs claim that any "ISP traffic" is exempt from access no matter where the ISP POP is located. Under the ESP exemption, an ISP POP is entitled to be treated as an end-user premise. Local calls to the ISP POP do not result in assessment of carrier's carrier access charges, even if the ISP POP thereafter further transmits the call to a location in another state. On the other hand, long distance calls to the ISP POP, or long distance calls made from the ISP POP through the local exchange switch, are subject to the same access charges as are applicable to similar calls from other end users. Thus, in the VNXX scenario (as well as the standard access charge analysis), the ISP POP is to be treated in exactly the same manner as any other premise. Of course, in order to be treated as a local end-user premise, an ISP POP must be physically local. In this regard, the CLEC argument that the *ISP Remand Order* (16 FCC Rcd 9151 (2001)) somehow established a principle that "ISP traffic" is "exempt" from payment of ILEC access charges no matter where the ISP POP is located is flatly wrong.

- InterLATA/Interstate VNXX. A third scenario arises when the CLEC, using a number geographically associated with a particular local exchange area, hauls the traffic to an end user beyond the originating LATA (often in a totally different state). Under these circumstances the call is an interexchange call and access charges (not reciprocal compensation) present the proper compensation mechanism (which generally is treated as switched access under Qwest's tariffs).[4] The "equality" issues raised in connection with intraLATA VNXX do not arise here, because interLATA FX providers (if they are purchasing and paying for the proper products from ILECs) pay FGA [Feature Group A] access charges today on the open end of an FX line There is no cogent argument presented that *interLATA* VNXX providers should be treated any differently.[5] Indeed, such traffic should not be treated as VNXX traffic at all, because there is no way to allow interstate and interLATA calls to be treated as local calls without completely decimating the concept of local versus long distance calling that forms the heart of the existing regulatory access charge structure.

- InterLATA/Interstate VNXX to a Remote ISP POP. A number of CLECs have claimed that the interLATA VNXX construct includes delivery of a call to a CLEC POP for delivery to an ISP POP located in a remote LATA, often even a remote state. This argument is an extension of the second contention noted above -- that all calls to or from

[4] If the CLEC is providing access functionality to an interexchange carrier ("IXC"), the access is treated as jointly provided switched access and both Qwest and the CLEC bill the IXC for access. This is true even if the CLEC is acting as a combined CLEC/IXC and is providing access to its own long distance service.

[5] It is important to note that those who base an argument on what they claim to be the necessity of access equality between VNXX and FX services are careful to limit their factual presentations to intraLATA VNXX and intraLATA FX.

an ISP POP are "local" whether the POP is located within the local calling area or not. It is completely wrong. Delivery of a long distance call to or from a remote ISP POP is treated in precisely the same manner as delivery of a call to or from a remote telephone. The ESP exemption calls for treatment of an ISP POP as an end-user premise for access charge purposes. The claim that all traffic delivered from or to an ISP POP is local traffic is not supported by any rational reading of the ESP exemption. It is important to keep in mind that the *ISP Remand Order* does not provide the basis for a contrary conclusion. Neither that decision nor the *WorldCom* Court of Appeals decision[6] purported to deal with any issue other than the ones presented by an ISP POP in the same local calling area as the calling party.

II. VNXX Traffic is interexchange traffic that should be subject to the same access rules that apply to origination of other FX services. The proper treatment of both VNXX service and FX service is the recognition that both are long distance calls that are subject to payment of access when they use local exchange switching facilities for origination or termination.

In analyzing VNXX access charge issues, it is impossible to start from the incorrect premise that VNXX calls among multiple local exchange areas are "local" in nature. A different issue arises in the case of comparing VNXX access and FX access. In such a case, the proper comparisons must be between intraLATA VNXX and intraLATA FX and between interLATA VNXX and intraLATA FX.

- IntraLATA VNXX traffic is properly confined, for analytical purposes, to traffic where the originating (*e.g.*, ILEC) calling party and the terminating (*e.g.*, CLEC) called party are located within a single LATA but different local calling areas. AT&T makes it very plain that its vision of VNXX is precisely this (*i.e.*, limited to intraLATA VNXX), as do those Commission orders that discuss VNXX. Analysis of local calling areas should generally be undertaken by state authorities.

- The fact that a CLEC point of interconnection ("POI") is located within the same local calling area as the ILEC's originating customer is irrelevant to a determination of whether a call is long distance or local. The determining factor of whether the call is a long distance call or a local call is the location of the end-user parties (end points), not the location of the CLEC POI. Hence, AT&T's argument that recognizing that calls between local calling areas are long distance calls would destroy its right to have a single POI within a LATA is not accurate. No matter where AT&T places its single POI, calls within a local calling area are local, and calls between local calling areas are long distance.

- When the correct comparison of interLATA FX services and interLATA VNXX services is made, it is clear that switched access charges are paid when carriers properly order services from the ILECs to provide interLATA FX. Thus, even following

[6] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

AT&T's "equality" argument, switched access charges should properly apply to interLATA VNXX services because they apply to interLATA FX services.

- Arguments that the costs of delivery of a VNXX call are the same regardless of whether the CLEC end user is in the same local calling area as the ILEC end user miss the point. The regulatory cost structures that differentiate between local calls and long distance calls, intrastate calls and interstate calls, "enhanced service" access and feature group access, along with the multitude of other regulatory pricing anomalies, have long concerned the Commission. Indeed, the Commission has been aware of the problem of proper cost causation and cost assignment since the dawn of the access charge era, and in fact the ESP exemption has long been recognized as one of the examples of a misbalance between assigned cost and price. These pricing anomalies are today a prime motivation behind the Commission's pending docket on intercarrier compensation. The Commission cannot, based on the premise that the network functionality of two services provided by an ILEC might not vary even though the regulated prices diverge materially, simply make a determination that a single one of the regulated prices be modified in order to harmonize it with another price without examining the entire cost/price structure which underlies the anomaly. This is especially true when the lower priced functionality might be below cost. In other words, the Commission cannot bypass its own intercarrier compensation docket and modify the access rules on a piecemeal basis that does not take into account all relevant factors necessary to making such a modification rational.

In the *Verizon* and *Starpower* decisions,[7] the FCC determined, in the context of tariff and contract analysis conducted under the special jurisdiction of Section 252(e)(5) of the Act, that CLECs receiving intraLATA VNXX traffic (as defined here) were entitled to pay access based on the manner in which the specific ILEC that was a party to that extraordinary proceeding treated its own FX services (*i.e.*, the ILEC treated the traffic as local for its own FX services, and that fact was a significant factor in interpreting the language of the interconnection agreement between the ILEC and the CLEC). Under the circumstances of those cases, the end result was that the circumstances of the relevant agreements and tariffs resulted in a finding that the traffic would be exchanged under Section 251(b)(5) of the Act. However, neither case purported to establish a rule that was dependent on an interpretation of the Act, and neither case sought to dictate to state regulators either that equality between intraLATA FX access and intraLATA VNXX was required or the manner in which equality should be reached.[8]

[7] *See* note 2 *supra*.

[8] In both cases, the Commission had received jurisdiction by virtue of state regulatory referral under Section 252(e)(5) of the Act. In fact, in *Starpower*, the Commission expressly limited its holding: "In this complaint proceeding, we need not and do not address the legal and policy question of whether incumbent LECs have an affirmative obligation under sections 251(b)(5) and 252(d)(2) of the Act . . . to pay reciprocal compensation for virtual NXX traffic." *Starpower*, 18 FCC Rcd at 23634 n.68.

III. The ESP exemption entitles ISPs to have their POPs treated as end-user premises for purposes of assessing access charges, entitling them to connect to the Public Switched Telephone Network ("PSTN") as an end user would -- by purchasing local retail services instead of access services. This means that calls to an ISP POP located within the same local calling area as an ILEC calling party must be treated under the same analysis as all other calls within the same local calling area. Likewise, an ISP POP located outside the local calling area of an ILEC calling party, whether inside the same LATA or in a different LATA, must be treated under the same analysis as all other similar interexchange calls.

- A number of CLECs claim that the ESP exemption permits them to charge "reciprocal compensation" for calls that are delivered to an ISP POP even when calls to other similarly located end-user premises would result in payment of access or toll charges. This is predicated on the claim that the D.C. Circuit Court of Appeals in *WorldCom* ruled that all "ISP-bound" traffic should be subject to the reciprocal compensation provisions of Section 251(b)(5) of the Act. This argument misapprehends the *WorldCom* decision, the Act and the Commission's rules.

- The *WorldCom* decision dealt solely with the issue of whether the Commission had properly ruled that calls delivered to an ISP within the same local calling area as the calling party should, despite their long distance/interstate characteristics, nevertheless be classified as "local" for purposes of reciprocal compensation. Neither *WorldCom* nor the Commission's orders leading up to it ever addressed the long-standing requirement that calls delivered to an ISP POP in a foreign local calling area were subject to the same access charge principles as were calls to other end-user premises similarly located. This point was assumed by all parties, including WorldCom, in the litigation.

- For purposes of VNXX analysis, the ESP exemption must be the touchstone of the analytical framework. That is, the call is local if the call would be local if made to any other end-user premise, and is long distance if it would be long distance if made to any non-ISP end-user premise. This basic principle derives from the original access charge proceeding, where ESP providers, end users with "leaky PBXs" and private network owners were permitted to access the PSTN through local exchange switching facilities as end users, rather than carriers.

- A proper understanding of the ESP exemption is critical.

    i. The ESP exemption originated in 1983. In its initial *Access Charge* decision (93 FCC 2d 241 (1983)), the Commission had determined to assess carrier's carrier charges on "enhanced service providers" who used ILEC local exchange switching facilities to originate and/or terminate interstate traffic.

    ii. This decision was modified and the ESP exemption was put in place (97 FCC 2d 682 (1983)). The ESP exemption was part of the "leaky PBX" exemption from access. "Leaky PBXs," including private networks and ESP POPs,

which "leaked" interstate traffic into local exchanges without payment of carrier's carrier charges, were nevertheless permitted to be connected to a local switch as end users rather than via an access feature group. The forgone interstate switching revenue occasioned by these local connections to leaky PBXs, including ESP POPs, was to be recovered by an assessment of a fee of $25.00 per channel assessed on the ILEC special access lines between the "leaky PBXs" and IXC switches.

iii. "Leaky PBXs," including ESP POPs, as end user-premises, were "exempt" from the payment of access only when they were located within the local calling area of a party either calling to or called from the "leaky PBX".

iv. In the case of calls where a local number is used to transport a call to a carrier's premise (or other similar premise) not entitled to end-user treatment, the Commission's rules and the ESP exemption provide that LEC FGA services are required for interstate traffic. Local retail end-user service is not available for connection to an interexchange service except as provided in the Commission's rules. It has never been permissible for an ISP to insist that a remote ISP POP was in fact a local ISP POP.

v. Analysis of a call delivered from an ILEC customer to a non-ISP end user illustrates this point. Such a call is rated based on the location of the called and calling parties, with the locations of the end users being determinative of the nature of the call. The same principle applies when one (or both) of the end-user premises are ISP POPs. The ESP exemption simply enables the ISP to participate in rights and obligations attendant to its end-user status. Contrary to the claims of some CLECs, the local or interexchange nature of a call is dependent on the endpoints of the call, not the NXX of the called number.[9]

vi. The Interim Rules established in the *ISP Remand Order* (16 FCC Rcd 9151) governing payment of reciprocal compensation to CLECs for ISP-bound traffic apply as an overlay to these principles. That is, the *ISP Remand Order* established rules that apply to situations where the ISP receives local traffic at its POP and delivers that traffic to the Internet or other interstate locations. If the traffic is not local when it arrives at the ISP POP (*e.g.*, when the ISP POP is remotely located in anther local calling area), the normal ESP exemption rules apply and access must be paid because the call to the ISP POP is a long distance call. In those circumstances the call is treated as a long distance call and is not subject to reciprocal compensation.

[9] *Starpower* did not hold to the contrary. It simply held that a tariff that defined "local" based on NXXs for intercarrier compensation purposes would be read according to its terms. Given the primacy of interconnection contracts under the Act, this is hardly surprising.

IV. InterLATA VNXX Calls (*i.e.*, calls delivered by a CLEC to a different LATA or a different state) cannot be analyzed in the same manner as intraLATA VNXX calls. InterLATA VNXX calls are clearly long distance calls.

- The basic argument of CLECs on the basic VNXX issue is that VNXX is really virtual FX ("VFX"), and is entitled to be treated in the same fashion as traditional FX service.

- Traditional interLATA FX service is provided by carriers who connect their POPs to ILECs via FGA connections at the open end (*i.e.*, the end of the FX service which connects into the ILEC circuit switched local exchange). Because the closed end of the FX line is not connected to local exchange switching facilities, there are no access charges to be assessed.

- In the case of interstate FX service, FGA access services have always been required. Carriers ordering FX access pay the proper access rates under that feature group. Thus, whatever "equality" issue exists with intraLATA FX compared to intraLATA VNXX does not exist in the case of interLATA VNXX. If interLATA VNXX providers were able to avoid payment of the proper access charges, those providers would themselves be afforded an arbitrary and discriminatory regulatory advantage.

- This is also true of interLATA FX service between two LATAs within a single state -- access charges are routinely applied to such traffic.

- No party seems to seriously argue that a TDM voice call that is delivered by a CLEC to a terminating end-user point in a distant state is really a local call. Clearly the proper compensation mechanism in such a situation is switched access. InterLATA VNXX must be treated the same.

V. InterLATA VNXX calls from an ILEC to a CLEC ISP POP located in a different LATA/state are likewise long distance calls.

- Some CLECs argue that they should be able to treat calls to a remote (even very remote) ISP POP as local, even though a call to any other end-user premise under the same circumstances would be clearly long distance in nature.

- The observations set forth in Section III above dispose of this contention. An ISP POP is not entitled to any different treatment for access charge purposes than any other end-user premise.

- The *ISP Remand Order* is relevant only when the ISP POP is located in the same local calling area as the calling party. This is because the ESP exemption creates a special end-user regulatory status for ISPs compared to other interstate users of ILEC local exchange networks in terms of access charges and, at least potentially, reciprocal compensation. The ESP exemption was the predicate for the *ISP Remand Order*, and the ESP exemption does not apply outside of the local calling area in which the ISP POP is located. The Commission must recognize this and ensure that any decision it

issues does not accidentally rest on a misunderstanding of the ESP exemption and its resultant regulatory status for CLECs serving ISPs within the local calling area of a calling customer.[10]

VI. Conclusion.

The Commission must recognize that its existing rules and regulatory structures already cover the VNXX issue, certainly insofar as any claims by CLECs of a statutory right to reciprocal compensation are concerned. Such calls are long distance calls when more than one local calling area is involved in the call. When intraLATA VNXX calls are involved, CLECs and ILECs can agree to reciprocal compensation in their interconnection agreements, but reciprocal compensation does not flow as a necessity from the Act itself. In the case of interLATA (and, for purposes of the Commission, interstate) VNXX, access charges, rather than reciprocal compensation must be paid as a matter of law and rule. A call is local or interexchange based on its end points. This is true irrespective of the number that is dialed by the calling party, or whether the remote premise is a residential customer, a large business, or an ISP POP.

[10] This fundamental concept goes all the way back to the *First Local Competition Order* (11 FCC Rcd 15499, 16013 ¶ 1034 (1996)) in which the Commission made plain the law as it has existed since that time: ". . . the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic."